Tradelift Indopalm Industries Sdn Bhd (in liquidation) v Waris Selesa Sdn Bhd (in liquidation)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-17–01 OF 2017
MOHD NAZLAN J
10 OCTOBER 2017

Companies and Corporations — Winding up — Petition — Payment by plaintiff and received by defendant's liquidator subsequent to presentation of winding up petition on plaintiff — Whether date of presentation of petition became commencement date of winding up — Whether payment made subsequent to commencement date void under s 223 of the Companies Act 1965 — Companies Act 1965 ss 219 & 223

The plaintiff in the present case sought to make a claim for monies amounting to RM831,333.33 allegedly had been appropriated by the defendant in violation of s 223 of the Companies Act 1965 ('the Act') as the said monies were received and retained by the defendant's liquidator, one Dato' Chong Kwong Chin ('DC') subsequent to the presentation of the petition to wind up the plaintiff. It ought to be noted that under s 219 of the Act, the commencement of winding up is on the date of the presentation of the petition.

Held, allowing the application with costs:

(1) The payment of rentals was received from the plaintiff between 16 June–1 October 2015; and the rentals and deposits were retained and forfeited by DC after the presentation of the petition against the plaintiff on 25 May 2015. In other words, at the time of payment by the plaintiff to the defendant, a petition for the winding up had already been presented against the plaintiff. As the plaintiff was eventually wound up on 25 February 2016, the date of the presentation of the petition became the commencement date of winding up of the plaintiff pursuant to s 219(2) of the Act. Any payments subsequent to the commencement date, like the retention rentals and forfeiture of deposits were therefore void under s 223 of the Act (see paras 34–35).

(2) The plaintiff had established its case for the reliefs sought in its originating summons, given the court's finding that the payments in question constituted dispositions made by the plaintiff (by way of forfeiture and retention by the defendant) after the commencement of its winding up. The defendant did not seek to apply for any validating order in respect of the payments, which thus remained void and ought to be

returned to the plaintiff, as prayed for. The basis for any such validating application, assuming one were to be made, in any event be difficult to sustain (see para 85).

Obiter dicta:

(1) It used to be an important truism that directors ought to be conscious that the company may be wound up such that their behavior in the hiatus between the presentation of the winding up petition and the winding up order will be subject to particular scrutiny by the liquidator. But this may now no longer be of much practical concern because the commencement of winding up petition is under s 467 of the Companies Act 2016 on the date of the winding up order itself. It is no longer related back to the date of the petition (see para 84).

[Bahasa Malaysia summary

Plaintif dalam kes ini memohon untuk membuat tuntutan bagi wang yang berjumlah RM831,333.33 yang didakwa telah diperuntukkan oleh defendan yang melanggar s 223 Akta Syarikat 1965 ('Akta') kerana wang tersebut diterima dan disimpan oleh likuidator defendan, seorang yang bernama Dato' Chong Kwong Chin ('DC') selepas pengemukakan petisyen untuk menggulung plaintif. Ia patut diambil perhatian bahawa di bawah s 219 Akta, permulaan penggulungan adalah pada tarikh pengemukaan petisyen tersebut.

Diputuskan, membenarkan permohonan dengan kos:

(1) Bayaran sewa diterima daripada plaintif di antara 16 Jun–1 Oktober 2015; dan sewa dan deposit tersebut disimpan dan dirampas oleh DC sekepas pengemukaan petisyen terhadap plaintif pada 25 Mei 2015. Dalam perkataan lain, pada masa bayaran oleh plaintif kepada defendan, petisyen untuk penggulungan telah dikemukakan terhadap plaintif. Memandangkan plaintif akhirnya telah digulung pada 25 Februari 2016, tarikh pengemukaan petisyen tersebut menjadi tarikh permulaan penggulungan plaintif berikutan s 219(2) Akta. Apa-apa bayaran selepas tarikh permulaaan, seperti sewa yang disimpan dan perampasa deposit oleh itu adalah terbatal di bawah s 223 Akta (lihat perenggan 34–35).

(2) Plaintif telah membuktikan kesnya untuk relief-relief yang dipohon di dalam saman pemulanya, dengan dapatan mahkamah bahawa bayaran yang dipersoalkan membentuk *dispositions* dibuat oleh plaintif (melalui perampasan dan simpanan oleh defendan) selepas permulaan penggulungannya. Defendan tidak memohon untuk apa-apa perintah pengesahan berkaitan bayaran-bayaran tersebut, yang mana oleh itu kekal terbatal dan patut dikembalikan kepada plaintif, seperti dipohon. Asas untuk apa-apa permohonan pengesahan, dengan menganggap satu adalah hendak dibuat, walau bagaimanapun adalah agak sukar untuk mengekalkan (lihat perenggan 85).

Obiter dicta:

(1) Ia pernah menjadi kebenaran hakiki yang penting bahawa pengarah-pengarah sepatutnya sedar bahawa syarikat mungkin digulung dengan itu tingkah laku mereka terhenti di antara pengemukakan petisyen penggulungan dan perintah penggulungan akan tertakluk kepada penelitian tertentu oleh likuidator. Tetapi mungkin sekarang ini tidak lagi menjadi kebimbingan praktikal kerana permulaan petisyen penggulungan adalah di bawah s 467 Akta Syarikat 2016 pada tarikh perintah penggulungan itu sendiri. Ia tidak lagi berkaitan kepada tarikh petisyen tersebut (lihat perenggan 84).]

Notes

For cases on petition, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1801–1973.

Cases referred to

Arab-Malaysian Merchant Bank Bhd v Orient Apparel Bhd & Ors [2002] 1 MLJ 89, HC (refd)

Ashmark Limited, (In Liquidation and Receivership); In re [1990] 2 IR 10, HC (refd)

Atlas Services Pty Ltd; Re [1974] 4 ACTR 19, SC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

BSN Commercial Bank (M) Bhd v River View Properties Sdn Bhd and another action [1996] 1 MLJ 872; [1996] 1 LNS 63, HC (refd)

Burton & Deakin Ltd; Re [1977] 1 All ER 631, Ch D (refd)

CIMB Bank Berhad v Jaring Communications Sdn Bhd [2016] MLJU 920; [2017] 4 CLJ 465, HC (refd)

Dato' Tan Toh Hua & Ors v Tan Toh Hong & Ors [2001] 1 MLJ 369; [2001] 1 CLJ 733, CA (refd)

Denney v John Hudson & Co Ltd [1992] BCLC 901, CA (refd)

Ernest Cheong Yong Yin (under practice and title Ernest Cheong PTL Chartered Surveyors) v Mohammed Jamal bin Inche I M Salleh & Ors (Messrs Mah – Kamariyah & Partners interverner) [2014] 2 MLJ 404, CA (refd)

French's (Wine Bar) Ltd; Re [1987] BCLC 499, Ch D (refd)

Gray's Inn Construction Co Ltd; Re [1980] 1 All ER 814, CA (refd)

Kawin Industrial Sdn Bhd (in liquidation) v Tay Tiong Soong [2009] 1 MLJ 723, HC (refd)

Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd [1990] 3 MLJ 309; [1990] 2 CLJ Rep 253, HC (refd)

Margart Pty Ltd, Hamilton v Westpac Banking Corp and another; Re [1985] BCLC 314, SC (refd)

Neath Harbour Smelting and Rolling Works; Re [1887] WN 87; [1887] 56 LT 727, Ch D (refd)

A *NFC Labuan Shipleasing I Ltd v Semua Chemical Shipping Sdn Bhd* [2017] MLJU 900; [2017] 5 AMR 611, HC (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281; [1995] 1 CLJ 609, CA (refd)
Prestaharta Sdn Bhd v Ahmad Kamal bin Md Alif & Ors [2016] 4 MLJ 39, CA
B (refd)
Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd [2009] 5 MLJ 754; [2008] 6 CLJ 681, FC (refd)
Tan Kah Hoe & Anor v Budaya Adil Sdn Bhd [2000] 7 MLJ 530; [1999] 4 CLJ 759, HC (refd)
C
Teo Cheng Hua v Ker Min Choo & Ors [2015] 5 MLJ 365; [2015] 7 CLJ 328, CA (refd)
Tiong Cheng Peng & Anor v Ker Min Choo & Ors [2014] 9 MLJ 311; [2014] 4 CLJ 773, HC (refd)
D *West Mercia Safetywear Ltd (in Liquidation) v Dodd* [1988] BCLC 250, CA (refd)
Wong Wee Kheong & Anor v Daya Bersama Sdn Bhd [2013] 3 MLJ 313; [2013] 3 CLJ 969, FC (folld)

E **Legislation referred to**

Companies (Winding-Up) Rules 1972
Companies Act 1965 (repealed by the Companies Act 2016) ss 132, 219, 219(2), 223, 226(3), 233(1), 277(5), 281, 305, Form 75
Companies Act 2016 s 467
F National Land Code Forms 14A, 16A

Simon Hong (Michelle Yoong with him) (Simon Hong) for the plaintiff.
J Shamesh (Charlotte D William with him) (Jeeva Partnership) for the defendant.

G **Mohd Nazlan J:**

INTRODUCTION

[1] This is an application by the plaintiff by way of an originating summons H in encl 1, seeking the repayment of company funds said to have been made to the defendant subsequent to the winding up of the plaintiff in violation of s 223 of the Companies Act 1965.

[2] I allowed the application at the conclusion of the hearing and stated the I key reasons for the same. This judgment contains the full reasons for my decision.

KEY BACKGROUND FACTS

[3] The defendant is a private company having its registered address in Lahad Datu, Sabah. The plaintiff and the defendant had earlier on 14 June 2007 executed a management agreement pursuant to which the plaintiff operated, maintained and managed a palm oil mill known as Kilang Sawit Waris Selesa ('the mill') located at Lahad Datu, Sabah ('the management agreement').

[4] On 13 June 2014, the defendant was wound up pursuant to an order of the High Court of Sabah and Sarawak at Kota Kinabalu. One Dato' Chong Kwong Chin ('DC') had in conjunction thereto, been appointed as the liquidator of the defendant. Following the winding up of the defendant, DC appointed the plaintiff to continue to operate the mill pursuant to a tenancy agreement dated 16 May 2014 ('the tenancy agreement').

[5] However, by a notice dated 26 June 2015, DC terminated the tenancy agreement and the management agreement on the basis of the plaintiff's alleged default in ensuring rental payments for the period from November 2014–June 2015. DC also forfeited the deposits paid towards the outstanding rentals.

[6] On 25 February 2016, the plaintiff was wound up by the High Court of Malaya at Muar. One Mr Ng Pyak Yeow and Mr Venkiteswaran Sankar, who had been made joint provisional liquidators of the plaintiff on 24 June 2015, were in conjunction with the winding up of the plaintiff, appointed its joint liquidators ('the plaintiff's liquidators'). The winding up order against the plaintiff was premised on a petition filed on 25 May 2015 by Kemajuan Tanah Jujur Sdn Bhd.

[7] In the present originating summons, the plaintiff now seeks to make a claim for monies in the sum of RM831,333.33 it contended had been appropriated by the defendant in violation of s 223 of the Companies Act 1965 ('the CA') as the said monies were received and retained by the DC as the liquidator of the defendant subsequent to the presentation of the petition to wind up the plaintiff. It is basic that under s 219 of the CA, the commencement of winding up is on the date of the presentation of the petition.

[8] For the purpose of commencing this action against the defendant, being a company already wound up, the plaintiff had on 20 December 2016 obtained leave from the High Court of Sabah and Sarawak at Kota Kinabalu under s 226(3) of the CA.

[9] The defendant had also filed an application in encl 6 to have the

originating summons struck out on the ground that it had been wrongly commenced in the High Court of Malaya at Kuala Lumpur instead of the High Court of Sabah and Sarawak at Kota Kinabalu. I dismissed the application on 4 August 2017.

[10] To begin the analysis of the issues, I think it apposite that the key principles on liquidation and void dispositions be first stated.

EVALUATION AND FINDINGS OF THIS COURT

Company liquidation and void disposition

[11] The liquidation process is for purposes of this case, governed by the Companies Act 1965 and the Companies (Winding-Up) Rules 1972 ('the Winding-Up Rules'). Crucially, a winding up order has a profound effect on the management of the company, for the directors would be divested of their powers which would now vest in the liquidator.

[12] The process is thus spearheaded and supervised by the liquidator whose primary function is to administer the affairs of the wound up company in accordance with the CA and the Winding-Up Rules with a view to winding up its affairs by realising its assets, paying off the creditors and returning any surplus assets to its members. Upon liquidation, the creditors must surrender their rights to enforce their claims and are bound to accept a scheme for the distribution of the assets of the company.

[13] Thus in *NFC Labuan Shipleasing I Ltd v Semua Chemical Shipping Sdn Bhd* [2017] MLJU 900; [2017] 5 AMR 611, I said:

> [34] ... Even though it may be initiated by a single petitioning creditor, upon the granting of the order for winding-up, the process which enables what may be regarded as the collective enforcement of proven debts of the company will be activated, for the benefit of not just the petitioner but instead the general body of unsecured creditors, all on *pari passu* basis ...

[14] The distribution of the assets operate in favour of all creditors as if made on a joint petition, meant to safeguard the interest of the unsecured creditors. In the performance of his function, a liquidator, as an officer of the court, performs both an administrative and a quasi-judicial function. The liquidator's quasi-judicial function relates to its authority to adjudicate proofs of debt lodged by the creditors, whose decisions may be challenged by way of appeal to the court by any aggrieved creditor.

[15] As an important creditor-protection measure, s 223 of the CA mandates the prohibition of disposition of the property of a company against which a

winding up petition is presented. The law as encapsulated in s 223 is clear in that upon the presentation of a winding up petition, a company cannot without the order of the court dispose of its property in whatever form and by whatever means. This is to prevent the improper dissipation of the company's assets before the winding up petition is heard and determined. And it seeks to preserve the company assets for the benefit of the general body of creditors (see *Tan Kah Hoe & Anor v Budaya Adil Sdn Bhd* [2000] 7 MLJ 530; [1999] 4 CLJ 759).

[16] Section 223 of the CA reads:

> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding-up by the Court shall unless the Court otherwise orders bey void.

[17] As such, once a winding up petition is presented against a company, it sets in motion the potentiality of the company being wound up, rendering it unable without order of the court to dispose of its property in whatever form and by whatever means. This, I reiterate, is to prevent the improper alienation and dissipation of the company's assets before the winding up petition is heard and determined. The basic principle is enunciated clearly in *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814, where the English Court of Appeal ruled:

> It is the basic concept of our law governing liquidation of insolvent estates, whether in bankruptcy or under the Companies Act, that the free assets of the insolvent at the commencement of the liquidation shall be distributed rate ably amongst the insolvent's unsecured creditors as at that date.

[18] As highlighted by the plaintiff, the observations of the Federal Court in *Savant-Asia Sdn Bhd v Sunway PMI-Pile Construction Sdn Bhd* [2009] 5 MLJ 754; [2008] 6 CLJ 681, expressed in the judgment of Arifin Zakaria FCJ (later Chief Justice) bear reproduction:

> [21] It is pertinent to note that the petition herein was grounded on the presumed insolvency under s 218(1)(e) read together with s 218(2)(a) of the Act. And under s 219(2) it is provided that the winding-up shall be deemed to have commenced at the time of the presentation of the petition for the winding-up. This provision has many important consequences, one of which is that once the winding-up petition has been duly presented it sets in motion the relevant provisions of the Act and the WUR vis-a-vis the respondent. Hence the validity of the respondent's argument that since the appellant's debt had been fully settled by the date the advertisement was published in the newspaper, the appellant is therefore no longer obliged to advertise does not hold water. In this case the winding-up petition was presented on 22 March 1999 and by virtue s 219(2) of the Act the winding-up of the respondent

is deemed to have commenced on that date. Therefore, as from that date the full rigour of the relevant provisions of the Act and the WUR would apply to the respondent.

[22] In this case, when the payment of debt was made on 11 May 1999 the winding-up had already commenced. This payment, therefore, comes within the provision of s 223 of the Act as disposition of the property of the respondent after the commencement of winding-up and is void unless the Court otherwise orders. Thus, the appellant could not in the circumstances claim exclusive right to the money paid. As Abdul Aziz Mohamad, JCA (as he then was) correctly said, 'Other creditors, if there were any, had an interest in it'. It is important to note that winding-up proceeding is a 'class right' or 'class remedy' as opposed to a writ action, this basic principle is embodied in the various provisions of the Act and the WUR, some of which will be considered in this judgment in due course.

[23] The prospective provisions that operate against the respondent are found in ss 222, 223 and 224 of the Act. They operate immediately upon the presentation of the winding-up petition (see s 219(2)). The Court of Appeal in *Kredin Sdn Bhd v Development & Commercial Bank Bhd* [1995] 3 MLJ 304; [1995] 4 CLJ 18 explained the implication of s 219 of the Act in the following words:

Thus, s 219 was enacted specially as a means to protect the creditors, particularly the unsecured creditors who must be treated equally when it comes to their executing their claims against the company in debt. That equality is maintained even during the interim period between the date of the presentation of the petition for winding-up to the date when the order for winding-up is made. During that period, the law sees to it that the assets or effects of the company will not be dissipated to enrich one or more unsecured creditors at the expense of the other unsecured creditors. Section 224 preserves the assets and effects of the company, and it is to safeguard this underlying principle that there is this notion of a relation back that once a winding-up order is made, it relates back to the date of the presentation of the winding-up, ie the date when the winding-up is deemed to have commenced. It follows that all attachments, sequestration, distress or execution put in force against the estate or effects of a company made within the interval of the presentation to wind-up and the date when the order to wind-up is made by the court, are void. The fact that no winding-up order will ultimately be made makes no difference to this finding, as s 219 is not concerned whether a winding-up order will ultimately be ordered or not, but that in mandatory tones it provides protection to unsecured creditors once a winding-up is deemed to have commenced, that is upon the presentation of the petition. Thus, to say that protection is only present as and when the winding-up order is eventually made is to go against the very intention of what Parliament had enacted. That protection arises once a winding-up commences and the date of the commencement is nothing more than a question of fact ascertained from the date of the presentation of the winding-up. For that reason, we consider that the decision reached in *Pembinaan KSY*'s case has been rightly made as opposed to the one in this appeal before us.

[24] One pertinent point to note is that the fact that no winding-up order was ultimately made is of no consequence, as s 219 of the Act is not concerned whether a winding-up order is eventually made or not, but seeks to provides protection to unsecured creditors upon the date of presentation of the petition.

> [25] As a class action the petitioner rank in *pari passu* with other unsecured creditors if any. Further s 226(4) of the Act provides that the winding-up order operates in favour of all creditors as if made on a joint petition.

[19] And it is important to be reminded that under ss 233(1) and 277(5) of the CA, the liquidator is empowered to take into his custody or under his control all the property and things in action to which the company is or appears to be entitled once a winding up order is made.

Evidence of disposition in Form 75

[20] The contention of the plaintiff is that the disposition caught by s 223 is evidenced in the Form 75 lodged on 18 February 2015 by DC, as the liquidator of the defendant where he acknowledged receiving a total of RM150,000 on 14 August 2014 from the plaintiff, comprising rental deposit of RM100,000 and utility deposit of RM50,000 ('deposits'). It is a requirement of s 281 of the CA that the liquidator lodge with the Companies Commission of Malaysia and the official receiver, generally after every six months, a form known as Form 75, in a format prescribed by the CA, to be verified by a statutory declaration, stating an account of the liquidator's receipts and payments, and a statement of the position in the winding up. The winding up of the plaintiff commenced on 25 May 2015. The defendant forfeited the deposits upon termination of the management and tenancy agreement on 26 June 2015.

[21] Significantly, based on another Form 75 lodged on 13 January 2016, DC further acknowledged having received monies, being rentals of mill, amounting to a total sum of RM681,333.33 from the plaintiff between 16 June–1 October 2015 ('rentals'). The rentals were thus also paid subsequent to the commencement of winding up.

[22] The Form 75, filed by DC, had also been verified, in accordance with s 281 as referred to earlier, by way of statutory declarations sworn by DC himself, whereby on each occasion of the lodgement of the said Form 75, it was duly declared, as per the prescribed format, as follows:

> the account of receipts and payments set out above contains a full and true account of my receipts and payments in the winding-up of that company and that I have not, nor has any other person by my order or for my use during that period, received or paid any moneys on account of the company other than and except the items mentioned and specified in that account.

[23] Neither did the defendant, as represented by DC's first affidavit, challenge the plaintiff's averments on DC's receipt of the payments of deposits and rentals from the plaintiff, as documented in the Form 75. This already

brings into play the established rule that a failure to credibly challenge a positive assertion in an affidavit is deemed to be an admission of the said assertion (see the leading authority of the Court of Appeal decision in *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609).

[24] It should be stated however that DC did, in his affidavit, on a without prejudice basis, averred that the rentals were instead made by third parties, and further challenged the plaintiff to show the contrary. But this stance of the defendant is difficult to sustain because the said averments by the defendant are devoid of any particulars, let alone any semblance of evidence. They are denials, mere and bare denials. This would of course not do. A proper, effective and meaningful response to an affidavit must in the instant case, involve the defendant condescending into particulars in order to credibly deny or dispute the said allegations. This the defendant plainly has failed to do.

[25] Instead, despite formal requests made by the plaintiff's liquidators, seeking confirmation on the tenancy agreement and the demand for payment of the deposits and the rentals, the defendant chose not to respond to the queries. The defendant also did not at that stage apprise the plaintiff that the rentals were allegedly paid by third parties.

[26] This thus calls into play the rule on estoppel, for the defendant ought rightfully to be estopped from disputing the forfeiture of the deposits and the receipt of the rentals from the plaintiff, especially considering the contents of the affidavit of DC affirming by way of a statutory declaration by DC clearly confirming that he had received the monies from the plaintiff (see the often quoted *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331).

[27] Not only that. This bare assertion by DC which plainly runs counter to his own statutory declaration accompanying the Form 75 represents an inconsistent stance. In other words, the defendant is now attempting to approbate and reprobate; blowing hot and cold. Reference must in this regard thus be made to the recent decision of the Court of Appeal in *Prestaharta Sdn Bhd v Ahmad Kamal bin Md Alif & Ors* [2016] 4 MLJ 39 where the court made the following observation against approbating and reprobating:

> (j) arising from the above, it is abundantly clear that the plaintiffs are 'blowing hot and cold' with an obvious intent to defeat the clear and unambiguous terms and covenants they had entered with the developer pursuant to their respective S&P's and DMC ...
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> (k) thus, in the case of *Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) and other appeals* [2012] 1 MLJ 761, the Court of Appeal said of the principle of approbation and reprobation as follows:

> We categorically say that the liquidator cannot blow hot and cold to suit him whenever he feels like it. He cannot approbate and reprobate in the same breath. On the one hand, he claims that the High Court order dated 26 July 2001 overrides or displaces a statute which renders the said order invalid and yet he has the audacity to continue to act as a liquidator by virtue of the said order. In the words of Sir Nicolas Browne-Wilkinson VC in *Express Newspapers plc v News (UK) Ltd and others* [1990] 3 All ER 376, at pp 383–384:
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> > There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance.'

[28] In addition, the considerable importance of Form 75 cannot be emphasised enough. This was examined by the High Court in the case of *Tiong Cheng Peng & Anor v Ker Min Choo & Ors* [2014] 9 MLJ 311; [2014] 4 CLJ 773 which held that the conduct of the liquidator altering the statutory Form 75 to suit his own ends could be considered serious and grave misconduct, no less than tampering with an official statement given on oath to the Registrar of Companies, and tantamount to an interference with ongoing court proceedings, as well as contemptuous.

[29] More relevantly, the Court of Appeal decision in *Teo Cheng Hua v Ker Min Choo & Ors* [2015] 5 MLJ 365; [2015] 7 CLJ 328 ruled that the act of the liquidator altering the figures stated in an earlier Form 75 by the filing of a subsequent Form 75 without any credible explanation was found to have been designed to thwart a removal application against the liquidator, and constituted an interference with the proper administration of justice and was also a contempt of court.

[30] In the instant case there was no direct alteration of the Form 75 by DC. Nor was there a lodgement of a fresh and subsequent Form 75 which contradicted an earlier Form 75 without explanation. But the conduct of DC, as the liquidator of the defendant in affirming an affidavit on the payments in question which patently contradicted his earlier statutory declaration accompanying the Form 75 is no less serious. He is, as stated earlier, as a liquidator, an officer of the court. His averment that the payments were made by third parties was a statement made on oath that so manifestly and directly contradicts his earlier declarations verifying the Form 75.

[31] Thus I find the submission of the plaintiff that DC has not only failed in his duty as a liquidator but has also directly interfered with the proper administration of justice not to be without merit. He not only failed to

properly respond to the request for explanation by the plaintiff. He has also put forth, under oath, a purported explanation which is so obviously inconsistent with his earlier statutory declarations verifying the Form 75.

[32] In this context, the following observations by Idris Harun JCA in *Teo Cheng Hua v Ker Min Choo & Ors* referred to earlier, are of relevance and bear emphasis:

> [19] It seems too much of a coincidence and indeed appears unlikely that it happened by chance for this court to accept the appellant's act in filing the alterations in the second Form 75 as a bona fide one. The alterations, we observe, made one month after the applicants' supporting affidavit in the removal application, would clearly and not unfathomable to suggest, that the appellant did so to thwart the removal application filed by the applicants and would only lead to an irresistible conclusion that the appellant had tampered with the documentary evidence in an attempt to pervert the administration of justice.
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> [20] The first Form 75 and statutory declaration was a material as well as an important documentary evidence in the applicants' removal application. We should say that in the context of s 281 of the Companies Act 1965 under which Form 75 is mandatorily required to be lodged by a liquidator with the registrar of companies, the form is an important statutory instrument by which the liquidator is made to declare as true an account of his receipts of any money and payments that he has made, including any dividend paid to creditors as well as any amount he has invested. The statutory declaration that the appellant had made in this regard is governed by the Statutory Declarations Act 1960 and needless to say that making a false statutory declaration is, by virtue of s 3 thereof, an offence punishable under the Penal Code. The appellant as an approved liquidator would have been fully aware of his obligation to ensure the accuracy and correctness of his verification in the first statutory declaration in the first Form 75.
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> [23] On a critical examination of the various affidavits and documentary exhibits in the record of appeal and viewed objectively, the logical and inevitable conclusion which can be drawn therefrom is that the appellant failed to offer some semblance of credible explanations as to why he altered the figures in the amended second Form 75 and did not acknowledge the payments and receipts from 29 March 2011 to 9 May 2011 which he earlier acknowledged in the first Form 75.
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> [24] Without doubt, there cannot be two versions of 'a full and true account' in both differing first and second statutory declarations.
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> [25] The conduct of the appellant in tampering with material documentary evidence before the court, in our judgment, clearly amounted to an interference with the due administration of justice and constituted contempt of court. We wish to express our understanding of the law of contempt of court in that primarily for there to be an interference with the administration of justice, only a likelihood of such interference would suffice. The Court of Appeal decision in the case of *Murray Hiebert v Chandra Sri Ram* [1999] 4 MLJ 321; [1999] 4 CLJ 65 on the correct test for contempt of court held:
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> > To constitute contempt of court, it is not necessary to prove affirmatively that there had been an actual interference with the administration of justice by reason

of offending statements. It is enough if it is likely or it tends in any way to interfere with the proper administration of justice (per Dua CJ in *Brig ET Sen (Retd) v Edatata Narayanan & Ors* 1969 AIR Delhi 201).

[26] The appellant in this regard had not just acted in a manner which was likely to interfere with the proper administration of justice but had actually directly interfered with it by the positive act of amending the first Form 75 by way of lodging the second Form 75 and affirming the second statutory declaration (see the *Monatech*'s case).

[29] The amendment of the first Form 75 by way of the lodgement of the second Form 75 and the second statutory declaration without good and credible reasons was beyond any argument sufficiently serious and connected to the removal application proceedings. We have absolutely no hesitation in finding that this was indeed an interference with the administration of justice warranting a committal order. Though mens rea is not a necessary element for contempt, (*Murray Hiebert v Chandra Sri Ram*), we are satisfied that there was clear mens rea in the conduct of the appellant in lodging the second Form 75 and the second statutory declaration.

[30] The conduct of the appellant in the whole episode constituted contempt of court ...

[33] That case concerns a committal proceedings in respect of the conduct of a liquidator. The instant case is however not a contempt proceedings. But it similarly concerns the conduct of a company liquidator which, given the sentiments expressed in these cases, clearly point to a serious shortcomings on the part of the conduct of the liquidator of the defendant vis a vis his treatment of the rentals and the deposits that further weakens the position of the defendant in this instant originating summons.

[34] The payment of rentals totalling RM681,333.33 was received from the plaintiff between 16 June–1 October 2015, after the purported termination of the tenancy. Not only that. The rentals and the deposits were retained and forfeited by DC after the presentation of the petition against the plaintiff on 25 May 2015 and subsequent to the appointment of the plaintiff's provisional liquidators on 24 June 2015. In other words, at the time of payment by the plaintiff to the defendant, by way of retention of rentals and forfeiture of deposits by the defendant, a petition for the winding up had already been presented against the plaintiff.

[35] It bears repetition that as the plaintiff was eventually wound up on 25 February 2016, the date of the presentation of the petition became the commencement date of winding up of the plaintiff pursuant to s 219(2) of the CA. Any payments subsequent to the commencement date, like the retention of rentals and forfeiture of deposits are therefore void under s 223 of the CA.

The defendant did not seek validation

[36] However, as stated in s 223, the offending disposition is void unless the court orders otherwise. The general principles applicable to the making of validation orders may be found in various case law authorities such as *Re Burton & Deakin Ltd* [1977] 1 All ER 631, *Denney v John Hudson & Co Ltd* [1992] BCLC 901; *BSN Commercial Bank (M) Bhd v River View Properties Sdn Bhd and another action* [1996] 1 MLJ 872; [1996] 1 LNS 63; *Tan Kah Hoe & Anor v Budaya Adil Sdn Bhd* [2000] 7 MLJ 530; [1999] 4 CLJ 759 and *Dato' Tan Toh Hua & Ors v Tan Toh Hong & Ors* [2001] 1 MLJ 369; [2001] 1 CLJ 733.

[37] In *Arab-Malaysian Merchant Bank Bhd v Orient Apparel Bhd & Ors* [2002] 1 MLJ 89 the High Court ruled that the court will validate a transfer of assets where the dispositions are part and parcel of credit facilities benefiting the company directly and its creditors generally, as part of the process to revive the fortunes of the company.

[38] The onus is on the applicant for the validation orders to satisfy the court of circumstances warranting the exercise of the discretion permitting the disposition. The court therefore has the discretion to validate payments. When a disposition is void, the onus is firmly on the interested party to make an application and demonstrate credible reasons to validate the payment.

[39] But crucially, in the instant case, the defendant chose not to apply for any validation order. On this basis, the resistance of the defendant to this originating summons cannot succeed.

[40] In any event, the discretion is exercised only in certain circumstances, particularly if it is in the interests of creditors that the company's business should be carried on and this objective can be achieved if the disposition is validated. Further, validation could be ordered if disposition was pursued in good faith in the ordinary course of business at a time when the parties were unaware that a petition has been presented unless there are grounds to believe that the disposition is an attempt to prefer one over the other creditors.

[41] In *In re Ashmark Limited, (In Liquidation and Receivership)* [1990] 2 IR 10 it was observed:

> ... I find it hard to envisage a situation where the court would validate a payment in full made after the commencement of a winding-up, in respect of services rendered, or goods sold, or other obligations incurred by the company prior to the winding-up, and when similar treatment could not be accorded to the general body of unsecured creditors.

Section 223 is designed to protect the general body of creditors

[42] Clearly the need to ensure that the creditors are treated equally is paramount. A leading authority in our jurisdiction on this point is the decision of the Federal Court in *Wong Wee Kheong & Anor v Daya Bersama Sdn Bhd* [2013] 3 MLJ 313; [2013] 3 CLJ 969 which affirmed that s 223 does not shut out bona fide transactions. The decision held that a validation order could be considered even after a winding up order has been granted (and not just upon presentation of the petition) based on two broad considerations; firstly, if the transaction(s) are beneficial to the general body of creditors; secondly, if it was just and fair to allow the transaction(s) with particular regard to the good and honest intention of the persons concerned. The defendant has plainly shown neither.

[43] Thus, his Lordship Zulkefli Makinudin CJ Malaya (now PCA) in *Wong Wee Kheong & Anor v Daya Bersama Sdn Bhd* [2013] 3 MLJ 313; [2013] 3 CLJ 969 held instructively:

> [13] ... However there are case laws that have distilled the principles involved in validating transactions after the commencement of winding-up, and even after a winding-up order has been granted based on two broad considerations:
>
> (a) If the transaction(s) are beneficial to the general body of creditors; or
>
> (b) If it was just and fair to allow the transaction(s) with particular regard to the good and honest intention of the persons concerned.
>
> [14] The general rule in s 223 of the Act is that it does not shut out *bona fide* transactions. In *Lian Keow Sdn Bhd (In Liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449; [1988] 1 LNS 44, Seah, SCJ made reference to a passage by Vaisey J in *Re Steane's (Bournemouth) Ltd* [1950] 1 All ER 21 which states:
>
> > ... that each case must be dealt with on its own facts and particular circumstances (special regard being had to the question of the good faith and honest intention of the persons concerned), and that the court is free to act according to the judge's opinion of what would be just and fair in each case.
> >
> > The discretion is an unfettered one.

[44] As such, in determining whether the validation orders requested should be granted, this court must be satisfied that the retention and forfeiture are firstly beneficial to the general bodies of creditors or that secondly, it would be just and fair to allow the same having in mind the good and honest intention of DC and the defendant in executing the transactions.

[45] Quite manifestly, satisfying and addressing the concern of only one creditor that was the defendant for the payment allegedly due from the plaintiff cannot be consistent with this first requirement set out by the Federal Court in *Wong Wee Kheong*. It is settled law that a court would not be inclined to validate any transaction which might result in a pre-liquidation creditor being paid in

full at the expense of the other creditors (see *Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd* [1990] 3 MLJ 309; [1990] 2 CLJ Rep 253 and *Tan Kah Hoe & Anor v Budaya Adil Sdn Bhd* [2000] 7 MLJ 530; [1999] 4 CLJ 759).

[46] Neither can the second criterion be met, for I do not think it can be safely said that it would be fair for the disposition be made on the basis of the knowledge of the defendant, honestly held or otherwise, when no assertion, let alone evidence had been adduced by the defendant to the effect that it did not know about the petition against the plaintiff.

[47] The observations of the Supreme Court of the Australian Capital Territory in *Re Atlas Services Pty Ltd* [1974] 4 ACTR 19 merit reproduction, thus:

> In the present, the payments were made to a creditor in respect of debts which had been incurred earlier.
>
> It is nevertheless true, as a general circumstances, that payment of a past debt, where there are no special circumstances, will be validated; in general, it is the very type of transaction which the section is designed to nullify, or void.
>
> The onus of making out a case for a favourable exercise of discretion is upon the respondent. It is submitted that it received the payments in good faith and in the ordinary course of business, and that they should therefore be validated. Certainly the evidence shows that the transactions were honest ones so far as the respondent was concerned, and that it did not have knowledge of the pendency of the petition. I have already said that the validity of a payment is not to be tested by asking simply whether it was made in the ordinary course of business. Some adverse features appears. At the time of the payments the company was in arrear with payment of its debt; the inference should be drawn that it was going out of business, and that the manager of the respondent knew, or suspected, that this was so. The amounts in question have all the appearance of having been lump sum payments in reduction of a total indebtedness. It is not shown that they were related to any need to continue business, and earn income, or save loss, during the pendency of the petition. The fact that the payments were made while there was an outstanding liability in respect of a judgment obtained against the company over a year earlier does nothing to strengthen confidence in a belief that the payments were made with due consideration of the position of creditors other than the respondent.
>
> The situation can be regarded as simply one in which assets of the company were withdrawn and paid over to one favoured creditor while the petition was pending, without any actual or prospective advantage to the company or its general body of creditors. It is probably the type of situation to which the above cited passage in Halsbury's Laws of England is directed. In these circumstances, the prima facie thrust of the section should be given effect to. The respondent can, of course, prove in the liquidation for the sum involved.

[48] In the instant case, there is no averment by DC or the defendant that it was not aware at the time of the retention of rentals and forfeiture of deposits that a winding up petition had been presented against the plaintiff. Yet, they did not notify the plaintiff's liquidators of the payments and DC's intention to retain the rentals and forfeit the deposits. DC still deemed it proper for the same be made post the date of the petition, and there is no evidence that any of such payments has been validated by the courts, for no applications had ever been made in the first place. As such, it is clear that all the payments made after the commencement of winding up are void by virtue of s 223 of the CA.

[49] In the instant case, the plaintiff was effectively insolvent and monies were disposed without the knowledge of the plaintiff's liquidators. No evidence had been adduced to show the existence of any benefit accruing to the plaintiff and its general creditors from the business relationship it had with the defendant, or specifically by virtue of the disposition, which appears in all likelihood utilised to have settled any debt due to the defendant instead of to the other creditors, or even to the petitioner who in the first place, obtained the winding up order against the plaintiff.

[50] At the time of the receipt of the rentals and the forfeiture of the deposits, the tenancy agreement had already been terminated and the plaintiff at the material time had no other business. Thus, by no stretch of imagination can it be asserted that the disposition in question was necessary for the plaintiff's continuation of business in order to benefit its general body of creditors. Furthermore, no benefits had been able to be recorded by the plaintiff's liquidators to have been received, let alone available for distribution towards satisfying the proofs of debt filed by the creditors of the plaintiff.

[51] Yet another important aspect borne out of the facts of this instant application is that the plaintiff was already insolvent (prior to the presentation of winding up petition and the making of a winding up order against it) when the payments were received by DC for the defendant. Thus, a significant consequence of this state of affairs would be that the interest of the creditors of the plaintiff displaces that of its members. For in insolvency, the interests of the creditors are paramount.

[52] In the case of *West Mercia Safetywear Ltd (in Liquidation) v Dodd* [1988] BCLC 250, it was ruled that upon the insolvency of a company, the interests of the creditors would override those of the shareholders since from that point, the company's assets belonged, in a practical sense, to the creditors. In that case, since West Mercia was known by the director in question to be insolvent when he procured some £4,000 to be transferred from the company's account to a third party, the transfer was held to be a fraudulent preference which had been undertaken purely to relieve the said director of personal

liability under his guarantee, in total disregard for the interest of the general body of the creditors of West Mercia.

[53] Accordingly, the court granted the declaration sought by the liquidator that the director was guilty of misfeasance and breach of trust and that further he be ordered to repay the £4,000 transferred to the third party.

Payments by the plaintiff after commencement of winding up — issue for creditors of the plaintiff or of the defendant which received the payments?

[54] A major objection proffered by the defendant to this originating summons is the argument that the commencement of this originating summons tantamount to an abuse of the court's process because the plaintiff is neither a creditor nor a contributory of the defendant, pursuant to the CA. It is the submission of the defendant that the plaintiff had explicitly failed to demonstrate that it has an interest in law to commence this action beyond that of a mere busybody in respect of the disposition herein.

[55] The defendant maintained that from the grounds of judgment of the winding up proceedings of the plaintiff by the High Court at Muar, it cannot be disputed that the plaintiff has no legitimate interest in the mill as the management agreement between the parties too had been terminated vide a notice of termination dated 26 June 2015. The judgment by the High Court of Muar clearly states that the mill is owned by the defendant. Thus the defendant asserted that it is wrong in law and absurd for the plaintiff to continue to assert its rights over the palm oil mill and further allege that the dispositions received by the liquidator of the defendant to be void.

[56] The defendant contended that till to date there has not been any application filed by the contributories or the creditors of the defendant seeking for an order for void disposition. The defendant referred to the case of, among others, *Kimoyama Elektrik (M) Sdn Bhd v Metrobilt Construction Sdn Bhd* [1990] 3 MLJ 309; [1990] 2 CLJ Rep 253 and emphasised that the High Court allowed the application for void disposition for the sole purpose to protect the interests of the creditors. The creditors in that case opposed the disposition.

[57] The defendant took great pains to argue, repeatedly, that the primary intention of the legislature in incorporating s 223 is to protect the interest of the creditors, and not to permit strangers to invalidate dispositions which were otherwise lawfully obtained.

[58] In my view, it could not have been plainer than this that this argument of the defendant is but an absolute misconception. The contention on the

objective of s 223 and its reference to various case-law authorities are of course not inaccurate. But on the facts of the present application, the defendant has patently failed to appreciate the critical point that the subject company against which the allegation of void disposition has been levelled is not the defendant, but the plaintiff. The disposition was made by the plaintiff to the defendant. The defendant is only the recipient of the payments made by the plaintiff.

[59] The question is not the propriety of the receipt by the defendant but instead the making of the payment by the plaintiff. It is not about whether the creditors or contributories of the defendant complained about the receipt of the payment (by way of the forfeiture by DC, the liquidator) by the defendant. That is for all intents and purposes immaterial in the context of the present originating summons.

[60] The question to be asked by this court to enforce the law encapsulated in s 223 is quite simply whether the disposition by the subject company, in this case the plaintiff, of the property of the company (the retention and forfeiture of the rentals and deposits, respectively) was effected subsequent to the commencement of the winding up of the company, the plaintiff herein. If so, then the dispositions are void, unless validated. It would be for the creditors and contributories of the plaintiff, not the defendant, who could legitimately complain about any disposition by the plaintiff.

[61] The answer, as stated earlier, is a resounding Yes. For the retention and forfeiture were performed by DC, as the liquidator for the defendant, after the presentation of the winding up petition against the plaintiff on 25 May 2015. To put the matter beyond doubt, the termination of the tenancy agreement and the management agreement too was effected by notice dated 26 June 2015, subsequent to the commencement of the winding up, leading to the forfeiture of deposits, and the retention of the rentals.

Appointment of provisional liquidator of the defendant meant payments received from the plaintiff does not require validation?

[62] The defendant also advanced another argument of some interest. It was submitted that the provisional liquidator order dated 9 May 2014, the one which appointed the provisional liquidator for the defendant had expressly given wide powers to DC, as the liquidator to carry out his duties for the benefit and interests of the defendant. In such circumstances, the liquidator would not, so the defendant contended, be required to obtain a validating order under s 223 for its receipt of the payments in question simply because the said order of 9 May 2014 could be deemed, essentially, as a validating order.

[63] The defendant highlighted, not inaccurately, that para (j) of the said order dated 9 May 2014 clearly empowers and authorises the defendant's liquidator to draw, accept, make and indorse any bill of exchange and promissory note in the name or on behalf of the defendant. It was argued thus that it is explicitly clear that the defendant has the powers to accept and receive monies and their action of receiving monies cannot tantamount to a void disposition. As such, it was argued that this application by the plaintiff is mischievous in nature since the defendant cannot be made accountable for monies legitimately received vide a court order.

[64] I readily observe that no authorities were submitted by the defendant to support the contention that the order on the appointment of a provisional liquidator for the defendant 'is essentially a validation order'. It is plain to all and sundry that no authorities have been cited because none exists. This argument is but another manifestation of an erroneous appreciation of the application of the law to the facts of the case. If the disposition by plaintiff is void, it cannot be cured by the fact that the receipt of the payment was by a provisional liquidator duly appointed by the court. The status of the recipient is irrelevant. It is that of the subject company, by which I mean the company which effects the disposition of its property or the plaintiff herein which is crucial.

Not dispositions since payments were pursuant to pre-existing agreements?

[65] The other argument advanced by the defendant is that the transaction herein does not fall within the ambit of s 223 of the said Act as the crucial time of the transaction is when the parties had executed the management agreement and the tenancy agreement respectively on 14 June 2007 and 16 May 2014 which is clearly prior to the presentation of the winding up petition on 25 May 2015.

[66] The performance of the said agreements according to the defendant occurred prior to the commencement of the presentation of the winding petition on 25 May 2015. It is undisputed that the plaintiff did not at any point of time challenged the genuineness and/or the existence of the said agreements and instead continued to give full effect to the agreements by paying the defendant rentals even after post presentation of the winding up petition.

[67] Thus the management and tenancy agreements were effectively completed prior to the commencement of the winding up petition against the plaintiff. In support, the defendant refers to the case of *Ernest Cheong Yong Yin (under practice and title Ernest Cheong PTL Chartered Surveyors) v Mohammed Jamal bin Inche I M Salleh & Ors (Messrs Mah – Kamariyah & Partners interverner)* [2014] 2 MLJ 404 where it was held:

The transaction occurred before the commencement of the winding-up petition against the second respondent. The crucial time in determining the applicability of s 223 of the Act was at the point of the transaction. When the purchase price for the sale of the said property was fully-settled and the first respondent, as the purchaser, was given vacant possession. The appellant had never, at any point of time, challenged the genuineness of the sale of the said property.

Based on the above authorities, we are fully satisfied that the sale transaction of the property in question from the second respondent (as vendor) to the first respondent (as purchased) was effectively completed and concluded before the commencement of the winding-up petition against the second respondent (ie when the sale and purchase agreement and the respective Forms 14A and 16A were executed on 27 September 1993, full purchase price paid on 7 February 1994 and vacant possession handed to the purchaser on 28 February 1994).

Therefore such transaction does not amount to a disposition of the property of the company as stipulated under s 223 of the Companies Act 1965. The transaction does not contravene s 223; and therefore must be held to be valid. That being the case the issue of obtaining a validation order from the court as contended by the appellant does not arise. We must stress it here that a validation order for the disposition is only applicable and required when the said disposition or sale was carried out after the commencement of the winding-up petition and void in contravention of s 223 of the Companies Act 1965.

[68] This contention is in my view similarly short on substance. The basis upon which the Court of Appeal in that case proceeded to decide that the transaction on the sale of landed property did not come within the word 'disposition of the property of the company' was that the sale transaction of the property was effectively completed and concluded before the commencement of the winding up petition, when the sale and purchase agreement and the respective Forms 14A and 16A were executed, full purchase price paid, and vacant possession handed to the purchaser, all before the presentation of the petition.

[69] It was thus, as ruled by the Court of Appeal, not even necessary to seek the validation order. The company had divested its beneficial ownership in favour of the purchaser and merely held the property as a bare trustee for the benefit of the purchaser who had obtained equitable rights over it at the commencement of the winding up of the company.

[70] But clearly, that was a case where everything had been done apart from legal registration of the landed property. Beneficial ownership had been ruled to have been passed prior to the commencement of winding up in that case. And crucially that was a disposition of a landed property and not of a chose in action like company funds. However, in the instant case before me, the relevant tenancy agreement had been terminated, and the deposits that concerned the

period beyond termination as well as the rentals post termination were nevertheless still either made to, received, forfeited or retained by the defendant.

[71] In any event, none of the payments of rentals or deposits had been shown by the defendant to have been lawfully made under the terms of the agreements which had been in any event, I repeat, terminated. Even if, for argument sake, these could be justified under the agreements, s 223 would still proscribe any such dispositions. Any lawful debt must still submit to the liquidation scheme designed to benefit the general body of creditors of the plaintiff.

[72] In a sense, the misconceived contention of the defendant is related to the point that a key element of the prohibition under s 223 is the phrase 'any disposition of the property of the company'. In a decision of the Supreme Court of New South Wales in *Re Margart Pty Ltd, Hamilton v Westpac Banking Corp and another* [1985] BCLC 314, which dealt with the phrase as it appeared in an equivalent provision in the law of that jurisdiction, stated thus:

> ... the phrase 'any disposition of the property of the company' in the context of s 368 relates to something done with property that the company is free to deal with. I do not think there is a disposal of property of the company when there is a dealing by someone who is really someone other than the company who has the right to say how it is to be dealt with, and whatever interest the company has in that property gives it no control of management over the property nor powers to interfere.

[73] Further, Vinelott J in *Re French's (Wine Bar) Ltd* [1987] BCLC 499 said of a similar English provision:

> where, before the presentation of a winding-up petition, a company has entered into an unconditional contract for the sale of property which was specifically enforceable, then the completion of the contract according to its terms after the petition has been presented would not constitute a disposition within the meaning of s 522.

[74] It is observed that Vinelott J in *Re French's (Wine Bar) Ltd* had also described the words 'disposition of property' to mean thus:

> The disposition of free assets to which the company is beneficially entitled and which are capable of being realised for the benefit of its creditors.

[75] Thus, in a sale of property transaction, which the instant case is not, the position is more straightforward. But the same cannot be said in a situation resulting in a creation of a debt, arguably like presently, where the transaction instead requires, in return for services rendered to the plaintiff, an expense over the property of the plaintiff, in the nature of its funds. Such payment to

discharge the plaintiff's legitimate liabilities would precisely be the ones proscribed by s 223 as it has the effect of favouring one over the other creditors, without any validation order. Otherwise all unsecured creditors could easily contend that the alleged debts owed to them were evidenced in some contracts (purportedly executed and completed prior to the commencement of winding up) that require payments be made to them by the plaintiff.

[76] Thus, the defendant cannot conveniently argue that the transaction is just like any other ordinary landlord and tenant relationship, where the plaintiff as a tenant had an obligation to pay rents pursuant to the agreements executed, in the ordinary course of business. For these would also be the kinds of payments that every unsecured creditor of the plaintiff could seek to challenge. The test propounded by the Federal Court in *Wong Wee Kheong* must still be applied.

[77] Furthermore, in the instant case, it is worthy of emphasis that crucially, the relevant agreements had even been terminated, thus even raising the question whether the payments (the forfeiture of deposits and retention of rentals) were contractually valid in the first place.

The plaintiff should take action against its own directors instead?

[78] The one other argument of the defendant that I should deal with is this. Since the payments were actually made by the plaintiff to the defendant in that the directors of the plaintiff had continued to pay the rentals to the defendant even after the presentation of the winding up petition against the plaintiff, which payments the plaintiff now find objectionable, the plaintiff should instead initiate appropriate action against its own directors for making the payments, and not commence this application against the defendant.

[79] Basically, this argument raised by the defendant's counsel at the hearing was that the fault lied with the directors of the plaintiff for having made the payments after the commencement of the winding up of the plaintiff, in violation of s 223. The liquidators of the plaintiff should have instead initiated action against the directors of the plaintiff.

[80] I think this contention, whilst not unattractive, is misconceived. Even if any impropriety could be attributed to the directors of the plaintiff, the fact that action is not or has not been taken against the directors of the plaintiff for making the impugned payments that resulted in the retention of the rentals by the defendant is entirely irrelevant to the right of the plaintiff to seek the invalidation and return of the payments effected by the plaintiff. If it is void, then the payments should be reversed.

[81] After all, a transgression of s 223 of the CA alone is sufficient basis to premise an action against a miscreant director for misfeasance under s 305 of the CA. Action may thus be taken against the relevant director for being responsible for making the void payments (see *Re Neath Harbour Smelting and Rolling Works* [1887] WN 87; [1887] 56 LT 727).

[82] Such a payment received by the defendant had in essence and substance meant that it had been granted an unfair preference over the other creditors of the plaintiff. This is also another aspect of a breach of a director's fiduciary duty. In the case of *Kawin Industrial Sdn Bhd (in liquidation) v Tay Tiong Soong* [2009] 1 MLJ 723 it was held that a director's act of making a payment of RM115,000 to himself compromised the financial position of the company in liquidation by depriving the company of otherwise utilising the said sum to pay off its trade creditors, and that this constituted a breach of duty under s 132 of the CA and tantamount to a misfeasance.

[83] In the case of *CIMB Bank Berhad v Jaring Communications Sdn Bhd* [2016] MLJU 920; [2017] 4 CLJ 465, action was successfully taken by the liquidator of the wound up company to declare a director of that company responsible for authorising various payments out of the company funds to be guilty of misfeasance under s 305 of the CA, and for certain of the said payments void under s 223 of the CA. This was my concluding observations in that case:

> [78] The aforesaid advances and payments, authorised by Dato' Norhisam as a director of the company give rise to an egregious compendium of a number of irregularities in the nature of transgression against the well-entrenched statutory and fiduciary duties of company directors. The list is inglorious in its extent and plainly indefensible for all intents and purposes. It cannot be shown that any of the disbursements or advances was for the benefit of the company. It has been shown that they involve various breaches of s 132(1) as well as s 132(2), what more those brazenly made to closely related individuals. All such payments effectively constituted preference to the detriment of the creditors of the company. Part of the advances to each of the five receiving parties were made after the commencement of winding-up of the company, rendering the same void under s 223 and all of the disbursements were made when the company was already in doubtful solvency. If these were loans, they are made against the provisions of ss 133 and 133A. Breaches of a director's statutory and fiduciary duties as well as misfeasance under s 305 has clearly been established on the basis of each of the individual transgressions and in any event overwhelmingly demonstrated by the list of violations of his statutory and fiduciary duties.

[84] It is of interest to note that it used to be an important truism that directors ought to be conscious that the company may be wound up such that their behaviour in the hiatus between the presentation of the winding up

petition and the winding up order will be subject to particular scrutiny by the liquidator. But this may now no longer be of much practical concern because the commencement of winding up is under s 467 of the Companies Act 2016 on the date of the winding up order itself. It is no longer related back to the date of the petition.

CONCLUSION

[85] In view of the myriad of reasons as discussed above, it is my judgment that the plaintiff has established its case for the reliefs sought in its originating summons, given the finding that the payments in questions constituted dispositions made by the plaintiff (by way of forfeiture and retention by the defendant) after the commencement of its winding up. The defendant did not seek to apply for any validating order in respect of the payments, which thus remain void and ought to be returned to the plaintiff, as prayed for. The basis for any such validating application, assuming one were to be made, would in any event be difficult to sustain. I therefore allow encl 1, with costs.

Application allowed with costs.

Reported by Dzulqarnain Ab Fatar